

Aldridge (Migration) [2019] AATA 2015 (5 April 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr John Desmond Aldridge
VISA APPLICANTS:	Mrs Nayla Naheed Khan Mr Rashad Zariat Islam Miss Sheezda Naziat Islam
CASE NUMBER:	1814129
DIBP REFERENCE(S):	BCC2017/2128635
MEMBER:	Ann Duffield
DATE:	5 April 2019
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations • The Tribunal makes no findings in relation to the secondary applicants and remits these to the Department for consideration.

Statement made on 05 April 2019 at 2:50pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa - subclass 309 – Sufficient evidence of genuine and continuing relationship – Definition of ‘Spouse’ – requirements of s.5F(2) are met –Decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 24 April 2018 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 16 June 2017 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because he found insufficient evidence to support a conclusion that the applicant and the sponsor were in a genuine spousal relationship as envisaged by the Migration Act.
4. The review applicant (the sponsor) appeared before the Tribunal on 2 April 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant. Both parties also attended a second hearing on 5 April 2019 to give further evidence and clarify earlier oral evidence.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

6. The parties provided the Tribunal with the delegate's decision along with their application for review.
7. The applicant is a citizen of Bangladesh born on 1 October 1972 (45 years old). Her two children born on 2 October 1997 (21 years old) and 21 March 2008 (11 years old) are the secondary applicants on the application. The applicant claims to have divorced her first husband on 15 February 2017.
8. The applicant has travelled extensively to India, Saudi Arabia and Nepal over the past 5 or 6 years.
9. The sponsor is a citizen of Australia born on 8 July 1949 (70 years old). He was previously married and has children from that relationship born in 1969, 1973 and 1979. His marriage ended in divorce on 17 January 2017. He has travelled out of Australia several times in the past few years. The sponsor claims to have converted to Islam through the Islamic Council of Western Australia on 29 June 1985. There is a document on the Department's file to support that claim. His Islamic Name is Darrus Bin Abdullah.
10. The parties claim to have first met on 8 March 2015 in Mecca, Saudi Arabia, after the sponsor began following the applicant's blog on Islam in around the middle of 2013. The sponsor travelled to Saudi Arabia and Bangladesh multiple times (around 14 times) to see the applicant and her children over a four or five year period.
11. The parties married on 8 March 2017 in an Islamic ceremony in Bangladesh.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the applicant is a spousal relationship with the sponsor as envisaged by the Migration Act.
13. Prior to the Tribunal hearing the parties provided a number of documents including the following:
 - Unsworn statements by the parties stating that their marriage is genuine. The parties also state that they are being harassed by the sponsor's adult children and have been threatened with death. His adult son has also threatened to burn the property to the ground. The sponsor states that he is now preparing his property for sale;
 - Statement from the applicant stating that the applicant's children have threatened to kill her;
 - Medical certificate indicating that the sponsor has been treated for an illness and hospitalised;
 - Bank statements of the applicants various accounts showing she has around AUD\$35,000.00 in Bangladesh;
 - Other bank statements for accounts in joint names;
 - Copy of the sponsor's Will appointing the applicant and one of the secondary applicant's as executer of his Estate;
 - Various unsworn statements and letters of support from people, including the applicant's family members, who claim to know the couple and attest to the genuine nature of the relationship;
 - Statement that the applicant owns her own property;
 - Statements from the applicant that their marriage is recognised by the applicant's family members;
 - Secondary applicant's admission receipt for the semester of spring 2019 to attend pre-university foundation studies; and
 - Prior to the second hearing the parties also provided a further statement from the applicant and also a statement from the applicant's son.

SPOUSE/DE FACTO (CL.309.211(2), CL.309.221)

Whether the parties are in a spouse or de facto relationship

14. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. There is a copy of the parties Niqab on the Department's file. For the current purposes, the Tribunal is satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

17. The Tribunal found the parties evidence at the hearing detailed, consistent and persuasive and accepts their claims for the following reasons.
18. The Tribunal has considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
19. Neither party is working at the moment. The sponsor relies solely on the age pension. In order to fund his trips to Bangladesh over the years he sold some logging rights on his property for \$25,000.00-30,000.00. The parties told the Tribunal that these funds had been exhausted.
20. The parties told the Tribunal that the applicant relies on income from investments of her own and several bank accounts – one of which has around AUD 60,000.00. The applicant also owns the apartment in which she and her children live. It was a gift from her father who built the flats. Her siblings also live in the same building. The apartment is in an elite area of Dhaka and the parties told the Tribunal that it is worth around AUD 300,000.00 if they decided to sell. Both parties told the Tribunal that they had not yet decided whether to sell but would wait and see what happened.
21. Whilst the parties do not yet have any joint assets both gave evidence that they would combine their liquidated resources when the applicant and her children arrive in Australia and buy their own home/business on the Gold Coast, the Tribunal is satisfied that the financial aspects of the parties relationship supports a finding that they are in a genuine and long term relationship and have a mutual commitment to a shared life together.
22. Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework. The parties gave consistent evidence about the arrangements of their household during the fourteen visits the sponsor has made to Bangladesh over the past several years.
23. Both parties, along with the applicant's son, gave consistent evidence about the role of the sponsor in their lives. The Tribunal notes that it is difficult in situations where the parties live in separate countries to produce evidence of these matters.

24. The Tribunal is nevertheless satisfied that the nature of the parties' household supports a finding that they are in a long term relationship and that they do not live separately and apart on a permanent basis.
25. Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
26. The sponsor has met and lived with the applicant's children and is known to all other members of her family who reside in the same building. The sponsor's family is apparently quite hostile to the sponsor's new marriage and family and are therefore not in their lives and nor is there any intention to involve them in their new lives on the Gold Coast. The parties have also provided photographs of themselves together and with other members of the family.
27. Given their current circumstances the Tribunal is mindful that there is little opportunity for the parties to engage outside their immediate family and accepts that there is little evidence of this aspect of their relationship. The Tribunal gives this little negative weight.
28. Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
29. The parties' account of their meeting and the development of their relationship was consistent and, whilst perplexing in some aspects, the Tribunal accepts that their account is nevertheless truthful and their beliefs in the longevity of their new marriage is genuinely held. Both appear to be genuinely committed to the applicant's children and all the evidence points to the sponsor having a close and supportive relationship to them both.
30. The parties have plans for a new life together and of raising the applicant's children together as a family. The Tribunal has found no reason to question their commitment to each other.
31. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
32. Therefore the visa applicant meets cl.309.211 and cl.309.221.
33. The Tribunal makes no findings in relation to the secondary applicants and remits these matters to the Department for a decision.

CONCLUSION

34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

35. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations.

- The Tribunal makes no findings in relation to the secondary applicants and remits these to the Department for consideration.

Ann Duffield
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).